92-1055

No. _____

Supreme Court, U.S.
FILED
DEC 15 1992
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In The Supreme Court Of The United States

October Term, 1992

WILLIAM H. SHOCKEY,

Petitioner,

v.

CITY OF PORTLAND, a municipal corporation; JACK C. IRVIN, individually and in his official capacity; and JOHN LANG, individually and in his official capacity,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oregon

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a public employee's motive is the controlling factor in determining whether that person's speech is constitutionally protected under the First Amendment where the content of the speech addresses a matter of public concern.

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In The Supreme Court Of The United States

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oregon

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner William H. Shockey ("Petitioner") respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of the State of Oregon entered on September 21, 1992.

OPINIONS BELOW

The Judgment and Opinion of the Supreme Court of the State of Oregon was entered on September 21, 1992, following the denial of a Petition for Reconsideration, is reported at 313 Or. 414, ___ P.2d ___, and appears in the Appendix. Judgment and Opinion was entered in the Court of Appeals of the State of Oregon on January 17, 1990, is reported at 100 Or.App. 166, 785 P.2d 776, and appears in the Appendix. Judgment was entered in the Circuit Court of the State of Oregon for Multnomah County on July 5, 1988, and appears in the Appendix.

JURISDICTION

The Judgment and Opinion of the Supreme Court of the State of Oregon was entered on September 21, 1992, following the denial on August 25, 1992 of Respondent's Petition for Reconsideration.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477-79, 481, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1973).

CONSTITUTIONAL AND STATUTORY .. PROVISIONS INVOLVED

Petitioner alleged a violation of 42 U.S.C. § 1983. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Petitioner bases his 42 U.S.C. § 1983 claim upon the First Amendment and the Fourteenth Amendment to the United States Constitution. The First Amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

US. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

William Shockey (Petitioner) was employed as a wastewater mechanic for Respondent City of Portland (Respondent or City) from December 31, 1981 until his discharge on June 11, 1985. Respondents John Lang (Lang) and Jack Irvin (Irvin) were his supervisors. Petitioner has worn a beard for 25 years, because he develops an inflammatory skin rash when he shaves and because he has a "weak chin".

During 1984, the City considered instituting a policy requiring wastewater mechanics and other employees who could be exposed to chlorine gas to wear respirators. In an effort to comply with administrative rules that prohibited the wearing of respirators over facial hair, the City intended to adopt a clean shaven policy for all wastewater mechanics. Petitioner wrote and circulated a petition within his agency protesting the regulations and submitted

the petition, which was signed by 34 persons, to City of Portland Commissioner Mike Lindberg, a publicly-elected official. Commissioner Lindberg instructed Irvin to "rethink" the policy.

Petitioner's petition states:

> "We, the undersigned, find the proposed rules demanding that beards be shaved **before** a respirator test can even be taken to be arbitrary and discriminatory. The wearing or not wearing of beards was not a condition of employment and any hazards that exist now existed at that time. Furthermore, if everyone on site is to be available in a chlorine emergency, the questions of fit, maintenance and hygiene of the respirators, the supplying of respirators for those who wear glasses, training of all employees in their use, hazard pay, and the availability of respirators for office staff, contractors' employees and visitors must be answered. The aforementioned proposed rules do not take into account the use of respirators by the last three mentioned groups. It would be far more practical to have a volunteer crew, specially trained and outfitted to deal with chlorine in emergency and non-emergency situations." (**Emphasis in original**) (emphasis added).

Despite the petition, the City implemented the policy on August 1, 1984. Petitioner subsequently attempted to obtain an exemption from the clean shaven policy. He submitted medical evidence that he has a psychological attachment to his beard and that he develops a most uncomfortable and distressing facial rash when he shaves. Nevertheless, the City refused to grant an exemption and subsequently discharged him.

Petitioner brought this action for violation of 42 U.S.C. § 1983, and state claims for wrongful discharge, intentional interference with economic relations and handicap discrimination. He alleged that the City had violated his right of free speech under the First and Fourteenth Amendments to the United States Constitution. Petitioner dismissed his handicap discrimination claim before trial. After Petitioner had rested his case the trial court granted a directed verdict against

Petitioner on his wrongful discharge and § 1983 claims. Although the trial court allowed the intentional interference claim to go to the jury, it struck any reference in the claim to Petitioner's right of free speech. The jury returned a verdict for Petitioner but did not award any damages.

Petitioner appealed the granting of the directed verdict. The Oregon Court of Appeals reversed and remanded on the § 1983 claim and the wrongful discharge claim. Respondents petitioned for review. The Supreme Court of the State of Oregon unanimously affirmed the Court of Appeals on the wrongful discharge claim, and in a majority opinion (four to three) reversed the Court of Appeals on the § 1983 claim.

REASONS FOR GRANTING THE WRIT

1. This Case Presents An Exceptionally Important Question That Concerns The Essence Of Constitutional Analysis Under The First Amendment.

This case squarely presents the issue of whether if the content of a public employee's speech on its face addresses a matter of public concern, the speaker's personal interest in making it can denude that speech of First Amendment protection, and, if so, under what circumstances. Stated differently, the question presented is whether motive is determinative in that analysis. Currently, Circuit Courts of Appeal are sharply split as to whether content or motive is the paramount factor in the analysis established in Connick v. Myers, 461 U.S. 138, 147-48, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983) (whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given

statement, as revealed by the whole record).[1] State courts of last resort are

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[1] Breuer v. Hart, 909 F.2d 1035, 1039 (7th Cir. 1990) (content is the greatest single factor in the Connick inquiry); Berg v. Hunter, 854 F.2d 238, 242 (7th Cir. 1988), cert. den. 498 U.S. 1053, 109 S.Ct. 1314, 103 L.Ed.2d 583 (1989) (even if the statement is an outgrowth of a personal dispute some aspect of it may touch upon matters of public concern); Havekost v. United States Dept. of Navy, 925 F.2d 316, 318 (9th Cir. 1991) (motive is not a litmus test, content greatest single factor); Rode v. Dellarciprete, 845 F.2d 1195, 1201 (1988) (motive not determinative, focus on content); Berger v. Battaglia, 779 F.2d 992, 998 (4th Cir. 1985), cert. den. 476 U.S. 1159, 106 S.Ct. 2278, 90 L.Ed.2d 720 (1986) (same); Cf. Schalk v. Gallemore, 906 F.2d 491, 495 (10th Cir. 1990) (look to subjective intent of the speaker); McEvoy v. Shoemaker, 882 F.2d 463, 466 (10th Cir. 1989) (focus on the motive of the speaker); Dorsett v. Bd. of Tr. for St. Colleges & Univ., 940 F.2d 121, 124 (5th Cir. 1991) (must assess speaker's primary motivation); Dodds v. Childers, 933 F.2d 271, 273 (5th Cir. 1991) (same); Pearson v. Macon-Bibb County Hosp. Authority, 952 F.2d 1274, 1278-79 (11th Cir. 1992) (context emphasized); Goffer v. Marbury, 956 F.2d 1045, 1049-50 (11th Cir. 1992) (same).

also in direct conflict regarding the application of the Connick analysis.[2] Sup. Ct. R. 10.1(b). The issue of the proper analysis under Connick is extremely important, because "speech concerning public affairs is more than self-expression, it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). In this case, the majority and dissent together represent the two divergent and irreconcilable approaches to First Amendment analysis which have developed in the wake of Connick. The

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[2] Kemp v. State Bd. of Agriculture, 803 P.2d 498, 503-04 (Colo. 1990), cert. den. ___ U.S. ___, 111 S.Ct. 2798, 115 L.Ed.2d 972 (1991) (personal motivation does not preclude content touching on matter of public concern); Cf. Roberts v. Joiner, 590 So.2d 195, 201-02 (Ala. 1991), cert. den. ___ U.S. ___, 112 S.Ct. 2302, ___ L.Ed.2d ___ (1992) (focus on extent to which speech calculated to disclose governmental officials wrongdoing); Cf. Brinkley v. City of Tacoma, 114 Wash.2d 373, 787 P.2d 1366, 1373 fn. 8 (1990) (Connick seems to say even the "slightest tinge" of public concern is sufficient).

existence of clear conflict among the Circuit Courts of Appeal and state courts of final resort on such a fundamental constitutional issue, coupled with the extreme importance of resolving that motive is not determinative of such a right, dictate that a Writ of Certiorari should issue.

2. The Majority Opinion Below Incorrectly Interprets First Amendment Precedent And Improperly Focuses On Petitioner's Motive.

a. Incorrect Interpretation Of Connick.

The majority below erred in holding that Petitioner's speech did not address a matter of public concern. Shockey v. City of Portland, 313 Or. 414, 431, ___ P.2d ___ (1992). The majority's analysis relied upon only two decisions, both from this Court - Pickering v. Board of Education, 391 U.S. 583, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) and Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). In examining Connick the majority reasoned

that the context in which the questionnaire was circulated was "the most important factor to the Court." Shockey, 313 Or. at 429. Based upon this analysis the majority found Petitioner only cared about his beard, and even though the argument in his petition "related to public policy" it did not pass the Connick threshold test of public concern. Shockey, 313 Or. at 330-31.

The majority's analysis is fundamentally flawed, because it is premised on the belief that context is the determinative factor in determining whether speech is a matter of public concern. In Connick, this Court clearly stated the context to be a personal grievance, i.e. "one employee's dissatisfaction with a transfer ...." Connick, 461 U.S. at 148. If context was the determinative factor, all the questions within the employee's questionnaire would

not have touched a matter of public concern. However, the Court found one question, Question 11, to be a matter of public concern because, notwithstanding its context, personal grievance, and its form, a questionnaire circulated only to other employees, its content or subject matter established it to be so. Connick, 461 U.S. at 148-49. For the majority below to be correct, all of the questions in Connick would have had to have been treated in the same manner. Shockey, 313 Or. at 445 fn. 14 (Unis, J., dissenting). The fact that the Court in Connick did not treat all the questions the same establishes that the majority below erred when it found Petitioner's argument "related to public policy" but, because context is the most important factor, it did not touch a matter of public concern. Shockey, 313 Or. at 429-31.

b. Improper Focus On Motive.

By elevating context to the status of the controlling factor in the determination of public concern, the majority below mistakenly transformed the motive of Petitioner's statement into its content. Rankin v. McPherson, 483 U.S. 378, 397, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (Scalia, J., dissenting). An employee's speech which addresses matters of public concern is protected even though the person's sole purpose is to protest a plan adverse to him personally. Zamboni v. Stamler, 847 F.2d 73, 77-78 (3rd Cir.), cert. den. 488 U.S. 899, 109 S.Ct. 245, 102 L.Ed.2d 233 (1988). The motive behind the speech is not relevant to the threshold question, rather it should be considered in the second prong of the Pickering balancing test. Johnson v. Lincoln Univ. of Conn., 776 F.2d 443, 451 (3rd Cir. 1985).

This focus on Petitioner's motive led to a further error. The majority below treated the petition as a single statement, and did not examine each statement within the petition. Such a simplistic approach ignored the detailed analysis used in Connick. Connick, 461 U.S. at 147-51; see Stever v. Independent School Dist. No. 625, 943 F.2d 845, 850-51 (8th Cir. 1991) (case by case determination requires particularized attention and evaluation of speech). In Connick the Court examined and evaluated each question, on the employee's single questionnaire, separately. Connick, 461 U.S. 147-51. However, in this case, the majority addressed the petition as a whole; and, having decided that Petitioner "cared about his beard, period" ruled all his speech did not address matters of public concern. Shockey, 313 Or. at 329-31.

By treating motive as determinative, the majority in this case summarily dismissed the elements of the petition that addressed the practicality and adequacy of the proposed work safety rules. The petition specifically pointed out that the rules did not take into account the use of respirators by staff employees, contractors' employees and visitors, any of whom could be exposed to a poisonous chlorine gas leak. The essence of all but the first two sentences of the petition is that the proposed city rule for dealing with a lethal substance was inadequate to protect large groups of employees and other members of the general public. Such speech involves public health and safety and therefore it relates to a matter of public concern. See Caldwell v. City of Elwood, Ind., 959 F.2d 670, 672 (7th Cir. 1992) (firefighter's personal safety concerns regarding department's use of ambulances are

"certainly a matter of public concern"); Shockey, 313 Or. at 442-45 (Unis, J., dissenting) (discussing numerous cases). Thus, at least part of Petitioner's speech related to "a matter of political, social or other concern to the community" and therefore passed the threshold public concern test. Connick, 461 U.S. at 146.

3. The Dissent Below And The Content-Based Analysis Present The Correct Interpretation Of Pickering And Its Progeny.

"Content, not context as stated by the majority [in Shockey], is the most important factor in the inquiry whether the public employee's speech passes the threshold public concern test." Shockey, 313 Or. 445-46 (Unis, J., dissenting). As a starting point, even the majority's review of Pickering led it to conclude that the decision was based on the "public's interest in the subject matter of Pickering's

letter as a whole." Shockey, 313 Or. at 426 (emphasis added). In Connick while distinguishing Givhan v. Western Line Consolidated School District, 439 U.S. 410, 415-16, 99 S.Ct. 693, 696-97, 58 L.Ed.2d 619 (1979), this Court observed that the employee's protest of racially discriminatory policies was "a matter inherently of public concern" (emphasis supplied); regardless of the choice of a private forum. Connick, 461 U.S. at 148 fn. 8. If the subject of a private protest can be said to "inherently" address a matter of public concern, the content of such a protest must have been taken to be determinative. Following Connick, in Rankin v. McPherson, 483 U.S. 378, the analysis by both the majority and dissent stressed the paramount importance of content. Rankin, 483 U.S. at 386-87, 396-97; see also McGowan and Tangri, A Libertarian Critique of University Restrictions of Offensive

Speech, 79 Cal. L. Rev. 825, 855 (1991) ("Rankin demonstrates that the concept of public speech has a very strong content base ....)". Thus, the majority's analysis in Shockey is contrary to the major holdings of this Court on the subject.

In Rankin though the majority and dissent differed as to the meaning of an employee's ambiguous comment, both opinions looked to the subject matter or content to make the threshold determination. Rankin, 483 U.S. at 386-87, 396-97. Context was used to determine the meaning of the speech, not the speaker's motive. The dissent criticized the majority's "transformation of the motive for [the employee's] statement into its content ... as misguided ...." Rankin, 483 U.S. at 397 (Scalia, J., dissenting) (emphasis in original). Although the rationale of the Rankin majority may be explained because it differed from the dissent as to the meaning

of the comment, the principle behind the dissent's criticism is sound - motive should not be determinative of the threshold public concern test.

In this case, the majority actually transformed the Petitioner's motive for the petition into the content of the petition, by finding motive determinative. Rather than using context to clarify any ambiguity in the meaning of the petition, as the Rankin majority did, the majority in Shockey held that context itself was determinative. The dissent in Shockey properly rejected this approach believing this Court's precedent establishes that content was the most important factor. The majority's error, if allowed to stand, would deprive Petitioner of his constitutional rights and have a chilling effect on the speech of all public employees in Oregon and elsewhere.

CONCLUSION

Content, rather than motive or context, should be the most important factor in determining whether a public employee's speech passes the threshold public concern test. Motive should not be determinative where the speech on its face addresses a matter of public concern.

For this reason, Petitioner respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the Supreme Court of the State of Oregon.

Respectfully submitted,

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APPENDIX

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1a	Decision and Opinion of the Supreme Court of Oregon filed on July 9, 1992.
86a	Order Denying Reconsideration in the Supreme Court of Oregon dated August 25, 1992.
88a	Appellate Judgment in the Supreme Court of Oregon entered on September 21, 1992.
91a	Decision and Opinion of the Court of Appeals of the State of Oregon entered on January 17, 1990.
102a	Judgment in the Circuit Court of the State of Oregon for the County of Multnomah entered July 5, 1988.

IN THE SUPREME COURT OF THE
STATE OF OREGON

William H. SHOCKEY
Respondent on Review
v.

CITY OF PORTLAND,
Jack C. Irvin and John Lang,
Petitioners on Review.

(CC A8611-06957; CA A49282; SC 36999)

In Banc

On review from the Court of Appeals*

Argued and submitted December 4, 1990.

Harry Auerbach, Deputy City Attorney, City of Portland, argued the cause and filed the petition for petitioners on review.

Richard C. Busse, Portland, argued the cause for respondent on review. With him on the response brief was Donald B. Potter, Portland.

Robert D. Durham, of Bennett & Durham, Portland, filed a brief on behalf of *amici curiae* Oregon Trial Lawyers Association, American Civil Liberties Union, Oregon Education Association, AFSCME Council 75, AFSCME Local 189, Portland Police Commanding Officers Association, Portland Police Association, and Oregon Public Employees Union.

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* Appeal from judgment of Multnomah County Circuit Court, Robert L. Kirkman, Judge pro tempore. 100 Or App 166, 785 P2d 776 (1990).

GILLETTE, J.

The decision of the Court of Appeals is reversed in part and affirmed in part. The judgment of the circuit court is reversed as to the wrongful discharge claim; otherwise affirmed.

Unis, J., concurred in part and dissented in part and filed an opinion in which Van Hoomissen and Fadeley, JJ., joined.

GILLETTE, J.

This action for damages involves a city employee's claim that he was wrongfully terminated in retaliation for circulating a petition protesting a work safety policy. The circuit court directed a verdict against the employee. The Court of Appeals reversed the judgment of the circuit court, holding that firing petitioner for circulating the petition would violate petitioner's right to

free speech under the federal constitution.[1] *Shockey v. City of Portland*, 100 Or App 166, 785 P2d 776 (1990). We reverse in part and affirm in part the decision of the Court of Appeals.

Plaintiff was a wastewater mechanic for defendant City of Portland (city). Defendants Lang and Irvin were his supervisors. During 1984, the city considered implementing a policy requiring wastewater mechanics and other employees who could be exposed to chlorine gas to wear respirators. Pursuant to an administrative rule, the policy also included a provision that required bearded employees to shave any facial hair that would be located under the sealing surface of the respirator.

Plaintiff, who has worn a beard for over 25 years, strongly opposed the policy.

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[1]The First Amendment to the United States Constitution, provides: "Congress shall make no law *** abridging the freedom of speech ***."

He circulated within his own city agency a petition that stated:

> "We, the undersigned, find the proposed rules demanding that beards be shaved *before* a respirator test can even be taken to be arbitrary and discriminatory. The wearing or not wearing of beards was not a condition of employment and any hazards that exist now existed at that time. Furthermore, if everyone on site is to be available in a chlorine emergency, the questions of fit, maintenance and hygiene of the respirators for those who wear glasses, training of all employees in their use, hazard pay, and the availability of respirators for office staff, contractors' employees and visitors must be answered. The aforementioned proposed rules do not take into account the use of respirators by the last three mentioned groups.
>
> "It would be far more practical to have a volunteer crew specially trained and outfitted to deal with chlorine in emergency and non-emergency situations."
>
> (Emphasis in original.)

In August 1984, the city implemented the policy. Plaintiff refused to shave his

beard and sought to be exempted from the policy by providing an evaluation from a social worker that he "is a normally integrated man who has organically integrated his beard into his identity." Evidence also indicated that plaintiff would develop "a most uncomfortable and distressing facial inflammatory skin eruption" if he shaved. The city refused to make an exception for plaintiff. Plaintiff did not shave off his beard. On June 10, 1985, the city discharged him.

Plaintiff sought review by the city's Civil Service Board. The board found that, in violation of the city's charter, the "discharge decision was not made in good faith for the purpose of improving public service" and ordered that plaintiff be reinstated with back pay.

Plaintiff then brought an action for damages based on the common law tort of

wrongful discharge.[2] He also claimed damages under 42 USC § 1983, on the ground that his employment has been terminated wrongfully because he had exercised his constitutionally protected right of free speech when he circulated his petition. Plaintiff also brought a claim against Lang and Irvin as individuals for intentional interference with economic relations.[3]

The case was tried to a jury. After plaintiff rested his case, the circuit court granted defendants' motion for directed verdict on the wrongful discharge and § 1983 claims, finding that there was "no evidence to indicate that [plaintiff] was terminated as a result of the circulation of the petition." The jury found in favor of

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[2]The common law tort of wrongful discharge was recognized by this court in *Nees v. Hocks*, 272 Or 210, 536 P2d 512 (1975).

[3]Before trial, plaintiff voluntarily dismissed a separate claim that is not relevant to this appeal.

plaintiff on the remaining claim against Lang and Irvin for intentional interference with economic relations, but awarded no damages.

Plaintiff appealed, contending that the circuit court erred in granting the directed verdict. The Court of Appeals agreed with plaintiff and reversed the circuit court's entry of the directed verdict on both the wrongful discharge and § 1983 claims. The Court of Appeals held that "there was evidence of a causal link between plaintiff's petition and his termination" and that the petition was constitutionally protected by the free speech guarantee of the First and Fourteenth Amendments to the United States Constitution.[4] *Shockey v.*

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[4]The Court of Appeals also held that the trial court erred in striking plaintiff's request for attorney fees under 42 USC § 1988 and in granting defendants' motion for summary judgment on plaintiff's claim for punitive damages under 42 USC § 1983. *Shockey v. City of Portland*, 100 Or App 166, 170, 785 P2d 776 (1990). The

City of Portland, 100 Or App 166, 170, 785 P2d 776 (1990). Defendants then petitioned this court for review, which we allowed. 310 Or 195, 795 P2d 554 (1990).

Defendants first contend that the circuit court lacked subject matter jurisdiction over plaintiff's common law wrongful discharge claim. Defendants reason that plaintiff's common law wrongful discharge claim is, in essence, a complaint alleging an unfair labor practice, "for which the Public Employees Collective Bargaining Act [PECBA], ORS 243.650 to 243.782, provides his exclusive remedy." Defendants argue in the alternative that, to the extent plaintiff's claim is not foreclosed by PECBA, "plaintiff's exclusive

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Court of Appeals affirmed the circuit court in striking plaintiff's request in his intentional interference claim for attorney fees incurred in reinstatement proceedings before the Civil Service Board. *Id.* at 171. Defendants do not challenge those holdings before this court.

judicial remedy for challenging defendants' action is by writ of review, under ORS 34.010 to 34.100."

PECBA defines certain acts as unfair labor practices. Under the Act, the Employment Relations Board (ERB) is responsible for investigating complaints alleging unfair labor practices and, if necessary, conducts a hearing before issuing a final order. ORS 243.676.

ORS 243.672(1)(g) provides:

> "(1) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
>
> "*****
>
> "(g) Violate the provisions of any written contract with respect to employment relations[.]"

The collective bargaining agreement between the city and the union to which plaintiff belonged stated that the city could not discharge any employee "without just cause." We understand defendants to argue that

plaintiffs' claim for common law wrongful discharge constitutes an unfair labor practice under ORS 243.672(1)(g), because the discharge would be without just cause in violation of the collective bargaining agreement. We shall assume, for the purposes of this opinion, that firing plaintiff "without just cause" would be an unfair labor practice that ERB could investigate. ORS 243.672(1)(g) and (4); ORS 243.676.

Defendants' argument requires us to consider whether PECBA deprives the circuit court of subject matter jurisdiction over the wrongful discharge action. ORS 243.676(1) charges ERB with investigating an unfair labor practice complaint. ERB holds a hearing to determine whether the person named in the complaint has engaged in or is engaging in any unfair labor practice. If so, ERB must state its findings of fact, order the person to cease

and desist from the unfair labor practice, take "such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as necessary to effectuate the purposes of" PECBA, and award representation costs and attorney fees. ORS 243.676(2).

PECBA, while granting jurisdiction to ERB to investigate and hear unfair labor practice complaints, is silent as to whether the Act was intended to foreclose common law state remedies, such as claims for wrongful discharge, and a review of the legislative history does not provide the answer to this issue.

This court has summarized its methodology in determining whether the legislature intended to foreclose a common-law remedy when it created a statutory one as follows:

> "[A]n actionable common law tort [remains actionable] *** unless the provisions of [the allegedly

> conflicting legislation] demonstrate the legislature's intent not only to provide what it considered to be adequate remedies to *** plaintiff, but by implication show a legislative intent to abrogate or supersede any common law remedy for damages. *See Brown v. Transcon Lines*, 284 Or [597], 611[, 588 P2d 1087 (1978)]."

Holien v. Sears, Roebuck and Co., 298 Or 76, 90-91, 689 P2d 1292 (1984).

PECBA expressly states that its purpose is to ensure that public employers and public employees enter into negotiations and collective bargaining agreements. For instance, ORS 243.656(5) states that:

> "It is the purpose of [PECBA] to obligate public employers, public employees and their representatives to enter into collective negotiations with willingness to resolve grievances and disputes relating to employment relations and to enter into written and signed contracts evidencing agreements resulting from such negotiations. It is also the purpose of [PECBA] to promote the improvement of employer-employee relations within the various public employers by providing a uniform basis for recognizing the right

> of public employees to join organizations of their own choice, and to be represented by such organizations in their employment relations with public employers."

PECBA also declares that the "people of this state have a fundamental interest in the development of harmonious and cooperative relationships between government and its employees," ORS 243.656(1); that "[r]ecognition by public employers of the right of public employees to organize and full acceptance *** [of] collective negotiation between public employers and public employee organizations can alleviate various forms of strife and unrest," ORS 243.656(2); that "[e]xperience in private and public employment has also proved that protection by law of the right of employees to organize and negotiate collectively safeguards employees and the public from injury, impairment and interruptions of necessary services, and removes certain

recognized sources of strife and unrest," ORS 243.656(3); and that "[t]he state has a basic obligation to protect the public by attempting to assure the orderly and uninterrupted operation and functions of government," ORS 243.656(4).

The purpose and policy underlying PECBA is that public employers and public employees resolve their disputes through resort to collective bargaining when there is a collective bargaining agreement. That approach is consistent with this state's policy that, ordinarily, an employee who is subject to a collective bargaining agreement first must utilize any collective bargaining agreement procedures as the vehicle for redress of disputes before resorting to a court action. *See, e.g., Gilstrap v. Mitchell Bros. Truck Lines*, 270 Or 599, 606, 529 P2d 370 (1974) *cert den* 421 US 1011 (1975) (so holding).

We perceive no reason to say that plaintiff's claim for wrongful discharge offends the purpose and policy of PECBA or this court's requirement that a complaining party first pursue its contractual remedies before seeking help from the court system. The present action does not interfere with PECBA's purpose of requiring public employers and employees to enter into negotiations and collective bargaining agreements, nor does it thwart the act's intent that disputes first be resolved through resort to contract remedies - plaintiff successfully exhausted his contract remedies when he appeared before the Civil Service Board. In this action, plaintiff seeks damages that were not available to him either before the Civil Service Board or before ERB. In short, in the terms of the standards identified in *Holien v. Sears, Roebuck and Co., supra,* there has been no demonstration of either

the legislature's intent to identify and provide an adequate remedy for all the harm suffered by plaintiff or of a legislative intent to supersede this common law remedy. The circuit court has subject matter jurisdiction to hear plaintiff's claim.[5] *Cf. Tracy v. Lane County*, 305 Or 378, 752 P2d 300 (1988) (ERB's jurisdiction under PECBA not exclusive, but is primary where the right of a party to seek relief in circuit court depends on defendant's having committed an unfair labor practice.)

Defendants next contend that the circuit court lacked subject matter jurisdiction over plaintiff's common law wrongful discharge claim because, defendants assert, plaintiff's sole judicial remedy under state law is a writ of review under

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[5]Our decision today speaks only to whether PECBA forecloses a particular form of tort action. We do not decide whether other types of claims likewise would be available in spite of the fact that PECBA was implicated.

ORS 34.010 to 34.100. Defendants rely on *Koch v. City of Portland*, 306 Or 444, 760 P2d 252 (1988), to support that assertion. Defendant's assertion is incorrect, and their reliance on *Koch* is misplaced.

The sole issue before this court in *Koch v. City of Portland, supra,* was whether the decision of the Mayor of the City of Portland, acting in his capacity as Commissioner of Public Safety, to suspend a Portland police officer, "was made 'in the exercise of judicial or quasi-judicial functions[.]'" *Id.* at 447. This court held that the suspension decision was a quasi-judicial act and, therefore, was reviewable by writ of review. *Id.* at 448-49. This court did not hold in *Koch*, or in any other case that has been brought to our attention, that, because writ of review is available to review a termination decision, the affected employee is precluded from bringing an

action for damages based on the common law tort of wrongful discharge.

As previously stated, plaintiff appealed his termination to the City of Portland Civil Service Board pursuant to Portland City Charter Section 4-501. The Civil Service Board found in plaintiff's favor, reinstated plaintiff with back pay and restored seniority and benefits. In *Miller v. Schrunk*, 232 Or 383, 388, 375 P2d 823 (1962), this court held:

> "When any charter or statute sets out a procedure whereby an administrative agency must review its own prior determination, that procedure must be followed. Judicial review [by way of writ of review] is only available after the procedure for relief within the administrative body itself *has been followed without success*." *(Emphasis added.)*

Plaintiff's success before the Civil Service Board made writ of review not only unnecessary, but unavailable. The circuit court has subject matter jurisdiction over plaintiff's common law wrongful discharge

claim. We turn now to a consideration of the evidence on the merits of plaintiff's claims.

Defendants argue that the trial court did not err in directing verdicts as to plaintiff's wrongful discharge and 42 USC § 1983 claims, because there was no evidence of a causal connection between plaintiff's circulation of the petition and his discharge.

In determining whether the trial court erred in entering a directed verdict for defendants, we view the evidence in the light most favorable to the non-moving party - in this case, plaintiff - and extend to that party the benefit of every reasonable inference that may be drawn from the evidence. *Foster v. Schnell Refrigeration Co.*, 280 Or 411, 414, 571 P2d 497 (1977).

The evidence would permit a trier of fact to find that Irvin and Lang were

hostile toward plaintiff's attempt to receive an exemption from the challenged policy. Other employees testified that management retaliated against employees who spoke out against management practices or on safety issues by firing them.[6] Lang admitted that plaintiff's petition made him angry and caused him some anxiety. Irvin admitted that he did not help plaintiff find other comparable city employment before terminating him, although he had assisted other employees who did not comply with the facial hair policy. While plaintiff had no proof to spare, the foregoing evidence, when combined with the reasonable inferences that can be drawn therefrom, was sufficient to allow a trier of fact to conclude that plaintiff was discharged for circulating his

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[6]Contrary to defendants' position taken in their petition to this court, defendants did not object to all of the testimony supporting the foregoing summary, and the evidence was not excluded by the trial court.

petition. The trial court's ruling to the contrary was error.

The foregoing sufficiency argument is the last argument asserted by defendants against the decision by the Court of Appeals to reinstate plaintiff's wrongful discharge claim.[7] Having found no error with respect to any of the claims that defendants make here, we affirm the Court of Appeals' decision to reinstate plaintiff's wrongful discharge claim. We turn next to defendants' contentions that deal specifically with plaintiff's claim under 42 USC § 1983.

After obtaining reinstatement through the civil service process, plaintiff brought

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[7]We do not intimate that the evidence to which we have referred necessarily makes out a case of wrongful discharge. But, because the only challenge that defendants make in this court is to the sufficiency of the evidence of wrongful discharge, we have not considered and do not address the other elements of that tort or whether evidence of the other elements was present in this case.

the present action, claiming that firing him because he wrote the aforementioned petition violated his right to free speech under the federal Constitution and that such a violation was actionable under 42 USC § 1983. No one disputes the latter half of his theory - if the circumstances of plaintiff's firing violated his free speech rights under the First Amendment, the firing is actionable. The fight here is over the first half, *viz.*, whether firing plaintiff on account of the petition violated his right to free speech.

Review of the relevant case law - case law coming from the United States Supreme Court, because the claim arises under federal law - leads us to conclude that one need consider only two pertinent cases to see that plaintiff fails to meet the criteria for obtaining the relief that he seeks. Because those cases are dispositive, we discuss them at some length.

The first important case was *Pickering v. Board of Education*, 391 US 563, 88 S Ct 1731, 20 L Ed 2d 811 (1968). Pickering, a high school teacher, had written a letter to a newspaper criticizing the local school board and the district superintendent for the way they had handled recent school financing efforts. He was fired. After the firing had been sustained in the state courts, the United States Supreme Court granted certiorari and reversed.

The Court first made it clear that public employees do not forfeit free speech rights by accepting public employment. *Id.* at 568. The Court recognized that a public employer has a right to expect loyalty on the part of its employees, but that loyalty could not be exacted at the expense of the right of the public employees to voice their views as to certain issues. Just which issues would transcend the rights of the employer to discipline its employees could

not be described categorically, the Court admitted. However, the Court said,

> "in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run."

Id. at 569.

The Court began by noting that nothing in Pickering's letter implicated a close working relationship between Pickering and any of the persons whom he was criticizing. "Thus," the Court said, "no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here." *Id.* at 570. Therefore, the Court held, a public employee's "comments on matters of public concern that are substantially correct" could not furnish grounds for dismissal, even if those comments were critical in tone. *Id.*

The Court then proceeded to examine the false statements that it found in Pickering's letter. As to those, the Court held, there was no proof of any harm to the district or its interests caused by the letter. (Indeed, the Court noted, "Pickering's letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief." *Id.*) "More importantly," the Court noted,

> "the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question, free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

> "*****
>
> "What we *** have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."

Id. at 571-73. (Footnote omitted.)

The Court's constant references to issues of "public importance" was no accident. As it summarized its holding:

> "In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."

Id. at 574. (Footnote omitted.) It is clear, both from text and context, that *Pickering* was based on the public's interest in the subject matter of Pickering's letter as a whole. It was the lack of interest that proved fatal in the other pertinent decision of the Court.

In *Connick v. Myers*, 461 US 138, 103 S Ct 1684, 75 L Ed 2d 708 (1983), the fired public employee, Myers, was an assistant district attorney. She objected to a proposal to transfer her to another section of the office and, when her protestations did not help, she resorted to circulating a 14-item "questionnaire" to her fellow employees that was not-so-subtly critical of the district attorney and his principal lieutenants. The district attorney determined that the questionnaire was an act of insubordination and fired her. She then brought an action in federal court under 42 USC § 1983, claiming that her free speech

rights had been violated. Both the district court and the court of appeals sustained her claim. On certiorari, the United States Supreme Court reversed.

The district attorney maintained before the Court that Myers' questionnaire concerned only internal office matters and, as such, did not constitute speech of "public concern," as that phrase had been used in *Pickering*. As a general matter, the Court was inclined to agree:

> "Although we do not agree that Myers' communication in this case was wholly without First Amendment protection, there is much force to [the district attorney's argument]. The repeated emphasis in *Pickering* on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental. This language, reiterated in all of *Pickering's* progeny, reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter."

Id. at 143. (Footnote omitted.) The key to *Pickering*, the Court explained, was the fact that "Pickering's subject was 'a matter of legitimate public concern' upon which 'free and open debate is vital to informed decision making by the electorate.'" *Id.* at 145. (Citation omitted.) In fact,

> *Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."

Id. at 146. (Footnote omitted.)

The Court was not drawing a line between employee speech wholly unrelated to any matter of general public concern, on the one hand, and speech that touches in some

minor way on matters of public concern, on the other. Even speech that alludes to matters of public concern does not, by virtue of that fact alone, bring the speaker within the ambit of First Amendment protections sufficient to support an action under 42 USC § 1983. The Court explained:

> "Whether an employee's speech addresses a matter of public concern *must be determined by the content, form, and context* of a given statement, as revealed by the whole record. In this case, with but one exception, the questions posed by Myers to her co-workers do not fall under the rubric of matters of "public concern." We view the questions [in the questionnaire] pertaining to the confidence and trust that Myers' co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers' dispute over her transfer to another section of the criminal court. *** [W]e do not believe these questions are of public import in evaluating the performance of the District Attorney as an elected official. Myers did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the

investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of [the district attorney] and others. Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo. While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors. These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that dispute into a cause celebre.

"To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark - and certainly every criticism directed at a public official - would plant the seed of a constitutional case. While as a matter of good judgment, pubic officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs."

Id. at 147-48. (Emphasis supplied.)

Not all cases could be resolved by this analysis, however. Some, including *Connick*, would require a further step. The Court explained:

> "One question in Myers' questionnaire, however, does touch upon a matter of public concern. Question 11 inquires if assistant district attorneys 'ever feel pressured to work in political campaigns on behalf of office supported candidates.'
>
> ***
>
> "Because one of the questions in Myers' survey touched upon a matter of public concern and contributed to her discharge, we must determine whether [the district attorney] was justified in discharging Myers. ***."

Id. at 149. (Footnotes omitted.) In other words, if, *when read in context*, part of Myers' questionnaire "touched on a matter of public concern," it was necessary to proceed to a second step in the analysis. That step involved balancing the interests of management and employee.

The Court then examined the various considerations that, under *Pickering*, should play a role in such a balancing analysis. A court in striking the balance was required to give "full consideration" to the government's interest in effective and efficient performance of its public responsibilities. *Id.* at 150. It was also pertinent that Myers' distribution of the questionnaire interfered with the necessarily close working relationship required between a deputy prosecutor and her superiors. *Id.* at 151-52. The time, place, and manner in which the questionnaire was circulated were also relevant. *Id.* at 152-53.

It was clear, however, that the context in which the questionnaire was circulated was, even in the balancing phase of the analysis, the most important factor to the Court. The Court reviewed that

consideration and then announced its conclusions, as follows:

> "Finally, the context in which the dispute arose is also significant. This is not a case where an employee, out of purely academic interest, circulated a questionnaire so as to obtain useful research. Myers acknowledges that it is not coincidence that the questionnaire followed upon the heels of the transfer notice. When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office. ***
>
> "Myers' questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that [the district attorney] tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment. ***

> "***[I]t would indeed be a Pyrrhic victory for the great principles of free expression if the [First] Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance that we see presented here."

Id. at 153-54. Thus, it will be seen that "context" is a pertinent consideration in both the first and second steps of the *Connick* analysis.

It will be clear from the foregoing that we do not disagree with the dissent as to the appropriate analytical framework. The difference between our view and that of the dissent is simple: We do not find the wording of plaintiff's petition, *in context*, to require us to proceed beyond the first step in the *Connick* analysis. As to that first step, the parallels between this case and *Connick* are great and, where there are

differences, the differences do not favor plaintiff. The similarities:

1. Both cases arose out of an employee's dissatisfaction with a management decision that affected that particular employee in a way that the employee disliked.

2. Both employees attempted to enlist the views of fellow workers in support of their position.

3. The principal thrust of each employee's message concerned the employee's particular grievance.

4. There is no suggestion that either employee raised any issue beyond the employee's immediate personal grievance other than for the purpose of gathering ammunition for the principal, personal fight that the employee already was waging.

5. Each employee confined the dispute to the workplace and to pertinent supervisory personnel.

The differences:

1. Plaintiff here chose a more direct form of challenge even than that employed in *Connick*. The questionnaire there at least purported to be intended for employees, not for management. The petition here was a direct challenge to management.

2. Unlike Myers' attitude in the *Connick* case, plaintiff's attitude here made him a less fit employee than others who complied with the shaving policy, because plaintiff could not assist in circumstances requiring use of a respirator.

3. Perhaps most importantly, there truly is no matter raised by plaintiff's petition that is of "public concern," at least in the *Pickering* and *Connick* sense of that term. Plaintiff here was not challenging any act of his supervisors as illegal. He was not speaking to any matter that either had been or would be put to a public vote. And he was not protesting,

even indirectly, office policy that was requiring other employees to give up or compromise one or another of their rights as citizens. In other words, this employee cared about his beard, period. To elevate that concern to a constitutional case merely because the employee mustered an argument related to public policy in pursuit of his personal goal would so trivialize the "public concern" requirement of *Pickering, Connick*, and other cases, as to read the requirement virtually out of existence.

Although its stated ground for its decision was incorrect, the circuit court did not err in dismissing plaintiff's claim under 42 USC § 1983. The Court of Appeals decision to the contrary was error.

The decision of the Court of Appeals is reversed in part and affirmed in part. The judgment of the circuit court is reversed as to the wrongful discharge claim; otherwise affirmed.

UNIS, J., concurring in part, dissenting in part.

The majority misreads well-established First Amendment[1] precedent used to determine the free speech of public employees. In so doing, the majority misconstrues the class of speech on which public employees may speak out without fear of retaliation. The majority's opinion has the potential to discourage disclosures of the sort of information that the public employee is particularly, and often uniquely, able to provide. Thus, the majority's opinion may deprive the public of valuable information with which to evaluate the performance of elected officials.

Plaintiff, a wastewater mechanic for the City of Portland (city), was discharged after he circulated a petition within his

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[1]The First Amendment to the United States Constitution provides: "Congress shall make no law *** abridging the freedom of speech ***."

agency protesting a work safety policy.[2] The city's Civil Service Board found that, in violation of the city's charter, the

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[2]Plaintiff's petition stated:

> "We the undersigned, find the proposed rules demanding that beards be shaved *before* a respirator test can even be taken to be arbitrary and discriminatory. The wearing or not wearing of beards was not a condition of employment and any hazards that exist now existed at that time. Furthermore, if everyone on site is to be available in a chlorine emergency, the questions of fit, maintenance and hygiene of the respirators, the supplying of respirators for those who wear glasses, training of all employees in their use, hazard pay, and the availability of respirators for office staff, contractors' employees and visitors must be answered. The aforementioned proposed rules do not take into account the use of respirators by the last three mentioned groups.
>
> "It would be far more practical to have a volunteer crew, specially trained and outfitted to deal with chlorine in emergency and non-emergency situations." (Emphasis in original.)

"discharge decision was not made in good faith for the purpose of improving public service," and ordered that plaintiff be reinstated with back pay. The majority concludes that the dismissal of plaintiff's 43 USC § 1983 claim[3] did not violate plaintiff's free speech rights under the First Amendment, because the petition did not address a matter that, in the majority's view, is of public concern.[4]

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[3]42 USC § 1983. The section provides:

> "Every person who, under color of any statute, ordinance, regulations, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ***"

[4]Remarkably, the majority recognizes that plaintiff's petition relates to public policy. 313 Or at 431. Nonetheless, the

It is beyond dispute that speech by a public employee which discloses information on matters of public health and safety is of public concern.[5] Because all but the first two sentences of plaintiff's petition address matters of public health and safety and because there is no evidence in the record that the circulation of the petition adversely affected the operations of the city, interfered with plaintiff's working relationship with his fellow employees, or impaired workplace discipline, I dissent from the majority's holding that denies plaintiff the right to proceed under § 1983. I concur, however, in the majority's decision concerning plaintiff's common law claim for wrongful discharge.

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majority holds that plaintiff's petition does not touch upon a matter of public concern.

[5]See discussion, *infra*.

Plaintiff's action under § 1983 is based on his claim that his employment had been terminated wrongfully in retaliation for exercising his right to free speech under the First Amendment. At his jury trial, after plaintiff rested his case, the trial court directed a verdict on the § 1983 claim, finding that there was insufficient evidence of causation, i.e., that there was "no evidence to indicate that [plaintiff] was terminated as a result of the circulation of the petition." The Court of Appeals reversed, holding that there was sufficient evidence of causation, that plaintiff's speech was a matter of public concern, and that plaintiff's petition was protected speech under the First Amendment. *Shockey v. City of Portland*, 100 Or App 166, 785 P2d 776 (1990). Defendants then petitioned this court for review, which we allowed. 310 Or 195, 795 P2d 554 (1990). The issue presented to this court as to

plaintiff's § 1983 claim is whether it was proper for the trial court to direct a verdict for defendants at the conclusion of plaintiff's case in chief.

I. 42 USC § 1983 CLAIM

A. *Jurisdiction*

Section 1983 of the Civil Rights Act, a successor of the Civil Rights Act of 1871,[6] was enacted in response to a perceived unwillingness by states to protect their citizens' rights. *Monroe v. Pape*, 365 US 167, 180, 81 S Ct 473, 5 L Ed 2d 492 (1961), *overruled on other grounds, Monell v. Department of Social Services of New York*, 436 US 658, 98 S Ct 2018, 56 L Ed 2d 611 (1978). "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence

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[6]Act of Apr. 20, 1871, ch 22, § 1, 17 Stat 13 (codified at 42 USC § 1983 (1982)).

fails." *Wyatt v. Cole*, ____ US ____, ____, ____ S Ct ____, ____ L Ed 2d ____, 60 USLW 4383, 4384 (May 18, 1992) (citing *Carey v. Piphus*, 435 US 247, 254-55, 98 S Ct 1042, 55 L Ed 2d 252 (1978)). Thus, § 1983 provides direct access to a judicial forum to all individuals who claim that their constitutional or other federal rights have been violated by persons acting under color of state law. *Collins v. City of Harker Heights, Texas*, ____ US ____, 112 S Ct 1061, 1066, 117 L Ed 2d 261 (1992); *Burnett v. Grattan*, 468 US 42, 50, 104 S Ct 2924, 82 L Ed 2d 36 (1984). "State courts have concurrent subject matter jurisdiction with federal courts over § 1983 actions." *Nutbrown v. Munn*, 311 Or 328, 337, 811 P2d 131 (1991) (citing *Maine v. Thiboutot*, 448 US 1, 100 S Ct 2502, 65 L Ed 2d 555 (1980).

B. *Background*

As relevant to this case, § 1983 provides a remedy to a public employee who

is discharged for exercising his or her free speech rights guaranteed by the First Amendment. *Rankin v. McPherson*, 483 US 378, 383, 107 S Ct 2891, 97 L Ed 2d 315 (1987) (citing *Perry v. Sindermann*, 408 US 593, 597, 92 S Ct 2694, 33 L Ed 2d 570 (1972)). The question then is whether a public employee's speech (here, plaintiff's petition) is protected by the First Amendment.

To determine whether a public employee's speech is protected by the First Amendment, we must consider a series of decisions by the Supreme Court of the United States which collectively suggest a method of analysis. I will discuss the relevant law in those decisions and the suggested methodology. I then will apply that methodology to this case.

In *Keyishian v. Board of Regents*, 385 US 589, 605-06, 87 S Ct 675, 17 L Ed 2d 629 (1967), the Supreme Court held that a public

employer may not condition public employment on the relinquishment of First Amendment rights. In *Pickering v. Board of Education*, 391 US 563, 88 S Ct 1731, 20 L Ed 2d 811 (1968), the Court qualified that holding by stating that, although a public employee does not surrender First Amendment rights to comment on matters of public interest by virtue of government employment, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 568.

In *Pickering*, the Court imposed two important limitations on a public employee's free speech rights guaranteed by the First Amendment. First, the Court suggested that false statements knowingly or recklessly made would not be protected. *Id.* at 574 and n 6. There is no contention asserted in this case that this limitation applies to

plaintiff's statements in this case. Second, the Court articulated a balancing test to determine whether the speech rights asserted by public employees are protected by the ~~First~~ Amendment. "The problem in any case[,]" said the Court, "is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

In *Connick v. Myers*, 461 US 138, 103 S Ct 1684, 75 L Ed 2d 708 (1983), the Court fine-tuned its holding in *Pickering*. In *Connick*, the public concern test made its debut in the area of public employee speech. There, the Court held that First Amendment protection afforded to a public employee under *Pickering* extends *only* to speech addressed to matters of "public concern" and

that unless the employee's speech involves a "matter of public concern," "it is unnecessary for [courts] to scrutinize the reasons for *** discharge." *Id.* at 146. Stated slightly differently, only when the public employee engages in speech addressed to matters of "public concern" is the First Amendment implicated.[7] "[W]hen a public

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[7]*See Mt. Healthy City School District Board of Education v. Doyle*, 429 US 274, 283-84, 97 S Ct 568, 50 L Ed 2d 471 (1977) (although untenured teacher can be dismissed for "no reason whatever," he cannot be fired for exercise of First Amendment rights).

> "'Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that amendment was to protect the free discussion of governmental affairs.' *Mills v. Alabama*, 384 US [214, 218, 86 S Ct 1434, 16 L Ed 2d 484 (1966)]. 'For speech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison v. Louisiana*, 379 US 64, 74-75[, 85 S Ct 209, 13 L Ed 2d 125,] (1964)."

Burson v. Freeman, ____ US ____, ____, 112 S Ct 1846, 1850, 119 L Ed 2d 5 (1992).

employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," the First Amendment does not protect that employee from termination. *Id.* at 147.

C. *Analytical Framework to Determine Whether Public Employee Speech is Constitutionally Protected*

The Supreme Court has framed a two-prong test to determine whether a public employee's speech is protected by the First Amendment. First, the employee's speech must involve a matter of public concern. Second, the employee's First Amendment rights in commenting on a matter of public concern must not be outweighed by the public employer's interest in providing public services efficiently. Each of these requirements must be satisfied before the employee's speech is protected by the First Amendment.

1. *Threshold Public Concern Test*

An employee's expression may be fairly characterized as constituting expression on a matter of public concern when it "relat[es] to any matter of political, social, or other concern to the community," *id.* at 146, as "determined by the content, form, and context of [that expression] as revealed by the whole record." *Id.* at 147-48. In answering the question whether the employee's speech involves a matter of public concern, the court must examine for itself the statements in issue and the circumstances under which they are made to see whether they are of a character that the First Amendment protects. *Rankin v. McPherson, supra*, 483 US at 386; *Connick v. Myers, supra*, 461 US at 150 n 10. "The inappropriate or controversial character" of the expression is irrelevant to the inquiry. *Rankin v. McPherson, supra*, 483 US at 387. Whether speech concerns a matter of "public

concern" is a question of law, not fact, for the Court. *Connick v. Myers, supra*, 461 US at 148 n 7.

2. *Pickering Balancing Test*

Even if the public employee's speech involves a matter of public concern and, therefore, passes the threshold public concern test introduced in *Connick* and, accordingly, the First Amendment is implicated, a retaliatory discharge nevertheless may not offend the First Amendment. As previously stated, the determination of whether a public employer has properly discharged an employee for engaging in speech of public concern requires an application of the *Pickering* balancing test, i.e., a balance between the interests of the employee as a citizen, in commenting on matters of public concern, and the interest of the governmental body as an employer, in providing public services efficiently. *Connick v. Myers, supra*, 461

US at 146; *Pickering v. Board of Education, supra*, 391 US at 568. Relevant to the balancing analysis is the manner, time, and place in which the expression is made. *Connick v. Myers, supra*, 461 US at 152. Impairment of workplace discipline and creation of disharmony with coworkers are factors to be weighed in the balance. *Rankin v. McPherson, supra*, 483 US at 388; *Connick v. Myers, supra*, 461 US at 152-53; *Pickering v. Board of Education, supra*, 391 US at 570-73. In applying the *Pickering* balancing test, a wide degree of deference will be given to the employer's assessment of such disruption, at least in situations where "close working relationships are essential to fulfilling public responsibilities."[8] *Connick v. Myers,*

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[8]For public employee speech that touches on matters of public concern in only a most limited sense, the public employer's disciplinary action will be upheld when the employer "reasonably believe[s that the speech] would disrupt the office, undermine

supra, 461 US at 151-52. If the public employer's interest in efficiency outweighs the employee's right to freedom of expression, the employee's expression is not protected by the First Amendment.[9] If the public employer's interest in efficiency outweighs the employee's right to freedom of expression, the expression is protected. *Rankin v. McPherson, supra*, 483 US at 392. Whether the employee's speech enjoys the protected status is a question of law for

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his authority, and destroy close working relationships." *Connick v. Myers*, 461 US 138, 154, 103 S Ct 1684, 75 L Ed 2d 708 (1983). While the test is cast in objective terms, its reasoning entails a large amount of subjectivity, as the public employer may take action based on his view of a potential for disruption. *Id*.

[9]Justice Scalia, joined by three other justices in *Rankin v. McPherson*, 483 US 378, 399, 107 S Ct 2891, 97 L Ed 2d 315 (1987) (Scalia, J., dissenting) couched the issue as whether the employer's interest in preventing the expression of such statements outweighed the public employee's First Amendment interest in making the statement.

the court. *Connick v. Myers, supra*, 461 US at 148 n 7.

D. *Causation*

If the public employee's speech is constitutionally protected, the public employee has the burden to show causation, i.e., that his or her speech was a "substantial" or "motivating" factor in the discharge decision, *Mt. Healthy City School District Board of Education v. Doyle*, 429 US 274, 287, 97 S Ct 568, 50 L Ed 2d 471 (1977), *i.e.*, that one of the reasons for the discharge decision was the employee's protected speech. *See Price Waterhouse v. Hopkins*, 490 US 228, 250, 109 S Ct 1775, 104 L Ed 2d 268 (1989) (same standard in suit under Title VII of the Civil Rights Act of 1964). If the public employee carries that burden, the burden shifts to the public employer to show by a preponderance of the evidence that it had other adequate grounds for dismissal, *Mt. Healthy City School*

District Board of Education v. Doyle, supra, 429 US at 287, *i.e.*, that the same adverse decision as to the public employee's employment would have been reached even in the absence of the protected speech.[10] See *Price Waterhouse v. Hopkins, supra*, 490 US at 244-45 (opinion of Brennan, Marshall, Blackmun, and Stevens, JJ.) (same standard in suit under Title VII of the Civil Rights Act of 1964); *id.* at 259 (White, J., concurring in the judgment); *id.* at 276-77 (O'Connor, J., concurring in the judgment). Whether the protected speech was a

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[10]The public employer "must show that it *would* have terminated him, not that it *could* have." *Gillette v. Delmore,* 886 F2d 1194, 1198 (9th Cir 1989) (emphasis in original).

"[T]he employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another." *Price Waterhouse v. Hopkins*, 490 US 228, 246, 109 S Ct 1775, 104 L Ed 2d 268 (1989) (discussion of burden of proof in suit under Title VII of the Civil Rights Act of 1964).

substantial or motivating factor in the decision to terminate employment is a question of fact. *Stever v. Independent School Dist. No. 625*, 943 F2d 845, 851 (8th Cir 1991).[11] If the public employer "fails to purge its [discharge] decision of the 'taint' of unconstitutional motivation, that decision cannot stand." Tribe, American Constitutional Law 816 (2d ed 1988) (citing *Mt. Healthy City School District Board of Education v. Doyle, supra*).

E. *Discussion of Key Supreme Court Decisions*

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[11]The sufficiency of the evidence to create an issue of fact for the jury is, of course, solely a question of law. *Stever v. Independent School Dist. No. 625*, 943 F2d, 845, 851 (8th Cir 1991). In reviewing a trial court's ruling on a motion for directed verdict on insufficiency of proof, an appellate court must view the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the non-moving party. *Foster v. Schnell Refrigeration Co.*, 280 Or 411, 414, 571 P2d 497 (1977).

The Supreme Court's discussions in *Pickering v. Board of Education, supra, Connick v. Myers, supra,* and *Rankin v. McPherson, supra,* provide a useful background for evaluating plaintiff's claim. In *Pickering v. Board of Education, supra,* a public high school teacher was dismissed for writing a letter to a local newspaper, criticizing the way in which the Board of Education had handled bond issue proposals and its subsequent allocation of financial resources between the school's educational and athletic programs. The teacher's letter also openly criticized the superintendent of schools for attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue. 391 US at 566. The Court held that the dismissal of the school teacher was an impermissible infringement on the teacher's protected speech, rejecting the notion "that teachers may constitutionally be compelled to

relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest." 391 US at 568. The Court framed the proper inquiry as "arriv[ing] at a balance between the interests of the teacher, as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 US at 568. The statements in the letter, the Court said, addressed "issues then currently the subject of public attention, which are critical of [the teacher's] ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." 391 US at 572-73 (footnote omitted). The Court held that, "absent proof of false

statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." 391 US at 574 (footnote omitted). Because no such showing had been made regarding the teacher's letter, the *Pickering* court held that the teacher's dismissal was impermissible under the First Amendment. *Id.* at 574-75.

In *Connick v. Myers, supra*, Myers, an assistant district attorney in New Orleans, was informed by Connick, the district attorney, that she would be transferred to prosecute cases in a different section of the criminal court. Myers objected to the transfer and, in this context, circulated a questionnaire to other employees. 461 US at 140-41. The questionnaire consisted of fourteen entries and is reprinted in the appendix to the opinion, *id.* at 155-56. Questions 1 through 5 asked employees to

describe their work experience with office transfers. Questions 6 through 9 asked employees about the existence of a rumor mill and its effect on office morale. Question 10 asked for an assessment of their confidence in certain named supervisors. Question 11 asked whether employees felt pressure to work in political campaigns supported by the district attorney. Questions 12 through 14 asked whether a grievance committee was needed, whether morale in the office was good, and whether any other issues of concern to the employees needed to be addressed. *Id.* Connick accused Myers of "creating a 'mini-insurrection,'" considered the questionnaire an act of insubordination, and discharged Myers. Myers filed suit under 42 USC § 1983, contending that her employment was wrongfully terminated because she exercised her First Amendment right of free speech. *Id.* at 141. The Supreme Court disagreed.

The Court held that only one entry, Question 11 - asking whether fellcw staff members felt pressured to work on political campaigns on behalf of office-supported candidates - touched on a matter of public concern. *Id.* at 149. The other questions were "mere extensions of Myers' dispute over her transfer." *Id.* at 148. These questions did not concern the office's performance of its prosecutorial functions, nor did they allege any fraud or wrongdoing. According to the Court:

> "While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors. These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre."

Id. at 148. "[As such, these questions did] not fall under the rubric of matters of 'public concern.'" *Id.*

With respect to Question 11, the only entry that did relate to a matter of public concern - the question concerning whether staff members felt pressured to work on political campaigns - the Court applied the *Pickering* balancing test and struck the balance for the public employer. *Id.* at 149. That is, the isolated statement (Question 11) was afforded protection to the point of requiring the *Pickering* balancing even though the statement was only one of 14 entries and could arguably be called a pretext for and motivated by the basically personal grievance. According to the Court, despite the "limited First Amendment interest involved," Myers' supervisor was justified in discharging Myers based on speech that he "reasonably believed would disrupt the office, undermine his authority,

and destroy close working relationships[,]" *id.* at 154, even absent any evidence of actual disruption. Myers' discharge did not, therefore, offend the First Amendment. *Id.*

In *Rankin v. McPherson, supra*, the firing of a data entry employee (deputy county constable) for privately remarking to a co-worker (who happened to be her boyfriend), after hearing of an assassination attempt on President Reagan, "if they go for him again, I hope they get him," 483 US at 381, was held to violate the employee's right of free speech under the First Amendment to the federal constitution. The Court held that the data-entry employee's remark, taken in context, constituted a matter of public concern, since it was made in the course of a conversation concerning the policies of the President's administration and came on the heels of a news bulletin regarding a matter

of heightened public attention, and was protected by the First Amendment.[12] *Id.* at 386. The Court stated that the constable did not demonstrate that the state interest justified firing the data entry employee: she had purely clerical duties and no law enforcement duties; the statement was made privately in a room not readily accessible to the public; and there was no evidence that the employee's statement had discredited her office or interfered with its efficient functioning. *Id.* at 388-89, 392.

F. *Application of Analytical Framework to This Case*

1. *Threshold Public Concern Inquiry*

Turning to the first requirement of the two-prong test to determine whether a public employee's speech is protected by the First

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[12]In contrast, an actual threat to kill the President would not be protected, the Court said. *Rankin v. McPherson, supra*, 483 US at 386-87.

Amendment, I agree with the Court of Appeals that plaintiff's petition does involve a matter of public concern. As previously stated, speech that can fairly be considered as relating to any matter of political, social, or other concern to the community is constitutionally protected, *Connick v. Myers, supra*, 461 US at 146, as determined by the content, form and context of that expression as revealed by the whole record. *Id.* at 147-48.

a. *Content*

Except for the first two sentences of plaintiff's petition, the *content* of plaintiff's petition addresses issues involving public health and safety. Omitting the first two sentences, plaintiff's petition reads:

> "[I]f everyone on site is to be available in a chlorine emergency, the questions of fit, maintenance and hygiene of the respirators, the supplying of respirators for those who wear glasses, training of all

> employees in their use, hazard pay, and the availability of respirators for office staff, contractors' employees and visitors must be answered. The aforementioned proposed rules do not take into account the use of respirators by the last three mentioned groups.
>
> "It would be far more practical to have a volunteer crew, specially trained and outfitted to deal with chlorine in emergency and non-emergency situations."

How the majority concludes that this language does not involve a matter of public concern[13] bewilders me.

The thrust of all but the first two sentences of plaintiff's petition addresses the practicability and adequacy of the proposed governmental work safety rules and regulations in protecting employees and other members of the public who could be exposed to a chlorine gas leak. In particular, the petition states that the proposed rules did not address that "fit,

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[13]313 Or at 429-31

maintenance and hygiene of the respirators," "training of all employees in their use," and whether "office staff, contractors' employees and visitors" would be required to wear respirators. The petition suggested an alternate solution for dealing with chlorine gas, a lethal substance, in emergency and non-emergency situations. The content of the speech in plaintiff's petition, therefore, went beyond plaintiff's personal employment concern (his desire to retain his beard), and expressed concern about health and safety in the work place and particularly about the protection afforded to employees and other members of the public from a chlorine gas leak. Plaintiff's petition, in essence, states that the proposed city rule for dealing with a lethal substance on city property was inadequate to protect large groups of employees and other members of the general public.

Speech by a public employee about public health and safety is clearly speech on a matter of public concern. In *Caldwell v. City of Elwood, Ind.*, 959 F2d 670, 672 (7th Cir 1992), a firefighter's statements to the mayor at the mayor's home discussing his (firefighter's) safety and employer's concerns regarding the fire department's use of ambulances are, the court said, "certainly a matter of public concern." In *Burgess v. Pierce County*, 918 F2d 104, 105-06 (9th Cir 1990), a county fire marshall's statements to county officials and members of the public that passage and enforcement of county ordinances would conflict with state fire flow and county ordinances, threaten life and property, and expose the county to potential tort liability were held to be a matter of public concern. In *Considine v. Board of County Com'rs*, 910 F2d 695, 700 (10th Cir 1990), a county employee's statements that alleged numerous

statutory and regulatory public health and safety violations were occurring on projects that were sponsored by the county and under the direction of the county's elected officials and administrative staff were held to involve a matter of public concern and were entitled to First Amendment protection. In *Mofin v. Albuquerque Public Schools*, 906 F2d 1434, 1437-38 (10th Cir 1990), a public school teacher's criticism of a superior's disciplinary philosophy was recognized as speech on a matter of public concern because "[g]enerally, speech by a public school employee about a policy or practice which can substantially and detrimentally affect the welfare of the children attending the school constitutes speech on a matter of public concern." In *Finch v. City of Vernon*, 877 F2d 1497, 1502 (11th Cir 1989), the court held that a police chief's "[w]arning [to the city council] that closing a public road would create a safety

hazard is speech on a matter of public concern." In *Price v. Brittain*, 874 F2d 252, 258 (5th Cir 1989), a state mental health facility social worker's statements to patients regarding their right to outside legal counsel and to prosecute civil actions against officials within the facility who were mistreating them were held to be a matter of public concern. In *Franzier v. King*, 873 F2d 820, 825-26 (5th Cir 1989), a nurse's report to superiors of violations of nursing practices in the prison infirmary which endangered the prisoners was held to be a matter of public concern. In *Gillette v. Delmore*, 886 F2d 1194, 1197-98 (9th Cir 1989), a firefighter's comments to his supervisor and other city workers criticizing the behavior of other firefighters and police officers in their handling of a drug overdose case were held to be speech about a matter of public concern. In *Teeters v. Scott*, 733 F Supp

1279, 1281-83 (ED Ark 1990), a nurse's comments to a mother of a patient that the patient was occasionally deprived of meals and bathroom privileges, and that hospital personnel were being mean to the patient, were a matter of public concern because they concerned the standard of care given a patient at a public institution. In *Brown v. Port Authority of New York and New Jersey*, 656 F Supp 517 (EDNY 1987), *aff'd without opinion*, 867 F2d 1424 (2d Cir 1988), a lieutenant in the security force assigned to JFK Airport was disciplined following his writing a memo to his superiors and his union in which he expressed the view that airport security was not sufficient to repel terrorist activity. Although the memo addressed plaintiff's personal safety concerns, noted the court, the memo essentially concerned the ability of the airport to respond to a matter of utmost public concern - terrorism. *Id.* at 521. In

Woodruff v. Bd. of Tru. of Cabell Huntington, 319 SE2d 372, 378-379 (W VA 1984), hospital employees' distribution near the hospital of leaflets disclosing a labor dispute with the hospital and the effects of job eliminations on the level of public health care was held to be speech on a matter of public concern.

Additionally, the Oregon Legislative Assembly has recognized that speech which discloses information on matters of pubic health and safety is of public import. ORS 659.510(1)(b)(B) prohibits a public employer from taking or threatening to take disciplinary action against an employee for the disclosure of any information that the employee reasonably believes is evidence of "substantial and specific danger to public health and safety resulting from action of the state, agency or political sub-division." One purpose of the Oregon Safe Employment Act, ORS 654.001 to 654.295 ORS

654.750 to 654.780, and ORS 654.991, is to "assure as far as possible safe and healthful working conditions for every working man and woman in Oregon." ORS 654.003. To accomplish that purpose, the Legislative Assembly provides a procedure that "[e]ncourage[s] employers and employees to reduce the number of occupational safety and health hazards and to institute new programs and improve existing programs for providing safe and healthful working conditions." ORS 654.003(1). Under ORS 654.062(5)(a), it is an unlawful employment practice for an employer "to bar or discharge from employment or otherwise discriminate against any employee or prospective employee," who "opposed any practice forbidden by [health and safety laws]" or who "made any complaint or instituted or caused to be instituted any proceeding under [the health and safety laws]."

b. *Form*

As to *form* of plaintiff's expression, plaintiff's petition was "posted on the company bulletin board," given to the city commissioner in charge of the Bureau of Environmental Services, and circulated among employees affected by the policy. The fact that plaintiff's speech was not directed to the public at large, to inform it of the perceived problems, is not determinative to the inquiry of whether the speech involves a matter of public concern. *See Rankin v. McPherson, supra*, 483 US at 386 n 11 ("The private nature of the [public employee's] statement does not *** vitiate the status of the statement as addressing a matter of public concern."); *see also* McGowan and Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech,* 79 Cal L Rev 825, 855 (1991) ("*Rankin* demonstrates that the concept of public speech has a very strong content base - the speech at issue

was not distributed in anything remotely resembling a public fashion."); *Gillette v. Delmore, supra*, 886 F2d at 1198 (a public employee's speech was held to involve a matter of public concern even though made to employee's supervisor and other city workers, and not to the public at large).

c. *Context*

Taken in *context*, I will assume that plaintiff's petition arose because of plaintiff's personal dissatisfaction with the proposed work safety policy. A motive of personal concern behind a public employee's speech is not, however, dispositive on the issue whether the employee's speech involved a matter of public concern. *Breuer v. Hart*, 909 F2d 1035, 1038-39 (7th Cir 1990); *Belk v. Town of Minocqua*, 858 F2d 1258, 1264 (7th Cir 1988). *Content*, not context as stated by the

majority,[14] is the most important factor in the inquiry whether the public employee's speech passes the threshold public concern test. *Breuer v. Hart, supra*, 909 F2d at 1039; *Belk v. Town of Minocqua, supra*, 858

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[14] The majority's analysis is premised on the notion that context is the most important factor and, in this case, the determinative factor, in determining whether something is a matter of public concern. 313 Or at 428 -429. The majority admits that plaintiff's petition relates to public policy, 313 Or at 430-31, but refused to consider it a matter of public concern because of the context in which it was presented. This analysis is fundamentally flawed. In *Connick*, the context was clearly stated by the Court to be a personal grievance, *i.e.*, "one employee's [Myers'] dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre." 461 US at 148. If context was the most important factor in determining whether the speech was a matter of public concern, what caused the Court to conclude that Question 11 was a matter of public concern? Even though Question 11 was presented in the context of thirteen other entries relating to a private grievance, it was found to be a matter of public concern because, notwithstanding its context (personal grievance) and form (circulated only to other employees), its content established it to be so.

1264; *Berg v. Hunter*, 854 F2d 238, 242-43 (7th Cir 1988), *cert den* 489 US 1053, 109 S Ct 1314, 103 L Ed 2d 583 (1989). Bodensteiner and Levinson, 1 State & Local Government Civil Rights Liability 77, § 1:08.50 (1987); McGowan and Tangri, *supra*, 79 Cal L Rev at 855.

In *Connick v. Myers, supra*, the Supreme Court considered one of Myers' thirteen questions - the question regarding pressure to work in political campaigns - to be of public concern, even though the Court found that Myers' grievances were fairly rooted in a personal dispute over her transfer. The fact that a "speaker was motivated by narrow self-interest" does not automatically mean that the issue is not of public concern. *Breuer v. Hart, supra*, 909 F2d at 1038-39; Bodensteiner and Levinson, *supra*. *Connick* makes clear that a public employee's statements motivated, triggered, or predominated by a personal grievance,

dissatisfaction, or narrow self-interests may nevertheless involve matters of public concern necessitating inquiry as to whether the employee's (plaintiff's) speech passes the second requirement of the two-prong test to determine whether the speech is protected by the First Amendment, namely, the *Pickering* balancing test. The fact that plaintiff's speech arose in the context of what began as a personal dispute does not, therefore, in itself disqualify that speech from constitutional protection.

In sum, as determined by the content, form, and context of plaintiff's expression as revealed by the whole record, I conclude that, despite whatever self-interests motivated or triggered plaintiff to circulate the petition, all but the first two sentences of plaintiff's petition concerns a matter of public concern.

2. *Application of Pickering Balancing Test*

Having determined that the speech in plaintiff's petition involves a matter of public concern, the court must balance plaintiff's First Amendment interest in commenting on a matter of public concern against the interest of the city, as an employer, in promoting the efficiency of the public services it performs through its employees. *Rankin v. McPherson, supra*, 483 US at 388-91. At the time that the trial court directed the verdict for defendants, the record did not support a finding that a legitimate city interest justified firing plaintiff. I find no evidence in the record that plaintiff's petition interfered with the city's interest in the effective and efficient fulfillment of its responsibilities to the public. Nothing in the record indicates that the circulation of plaintiff's petition impaired work-place discipline or created disharmony with co-workers. Nor does the record disclose any

evidence that plaintiff's superiors reasonably believed that plaintiff's speech would disrupt the operation of the wastewater treatment plant where plaintiff worked, undermine his superior's authority, or destroy close working relationships. Like *Rankin v. McPherson, supra*, there was no evidence that plaintiff's statements had discredited the city or interfered with its efficient functioning.[15] Similarly, there is no evidence that plaintiff's petition was circulated in an inappropriate time, place or manner. Absent any particularized

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[15] In fact, the city made no claim that plaintiff's petition disrupted the wastewater treatment plant, destroyed close working relationships with supervisors or fellow employees, or constituted insubordination.

As previously stated, the city's Civil Service Board found that, in violation of the city's charter, the decision to discharge plaintiff was not made in good faith for the purpose of improving public service. Defendants did not challenge the propriety of that finding.

evidence of defendants' interests in this case, I must conclude that, based on the record the trial court had before it when it directed the verdict, the employer's (city's) interest in efficiency does not outweigh the employee's (plaintiff's) freedom of expression. Without such a showing, plaintiff's First Amendment rights predominate. I conclude, therefore, that defendants were not entitled to a directed verdict on the issue whether plaintiff's petition is protected speech under the First Amendment to the federal constitution.

G. *Causation Determination*

Having determined that defendants were not entitled to a directed verdict with respect to the question of whether plaintiff's petition is protected by the First Amendment, I review the evidence to determine whether it is sufficient on the causation issue. If so, the trial court erred in entering a directed verdict for

defendants. If there was insufficient evidence to establish causation, the trial court correctly granted the defendants' motion for directed verdict. In determining the propriety of the trial court's directing the verdict, this court views the evidence in the light most favorable to the non-moving party (in this case, plaintiff), who is entitled to the benefit of every reasonable inference that may be drawn from the evidence. *Foster v. Schnell Refrigeration Co.*, 280 Or 411, 414, 571 P2d 497 (1977).

The evidence would permit a trier of fact to find that plaintiff's supervisors, Irvin and Lang, were hostile toward plaintiff's attempt to receive an exemption from the challenged policy. Other employees testified that management retaliated against employees who spoke out against management practices or on safety issues by firing them. Lang admitted that plaintiff's

petition made him angry and caused him some anxiety. Irvin admitted that he did not help plaintiff find other comparable city employment before terminating him, although he had assisted other employees who did not comply with the facial hair policy.[16] While plaintiff had no proof to spare, the foregoing evidence, when combined with the reasonable inferences that can be drawn therefrom, was sufficient to allow a trier of fact to conclude that plaintiff's speech was a "substantial" or "motivating" factor in defendants' discharge decision. There is no evidence in the record to show by a preponderance of the evidence that defendants had other adequate grounds for dismissal, i.e., that the same adverse decision to plaintiff's employment *would*

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[16]Contrary to defendants' assertions, defendants did not object to the testimony supporting the foregoing summary, and the evidence was not excluded by the circuit court.

have been reached even in the absence of the protected speech. It was error, therefore, for the trial court to grant defendant's motion for directed verdict on plaintiff's § 1983 claim.

II. CONCLUSION

For the foregoing reasons, I would remand this case to the circuit court for proceedings not inconsistent with this opinion.[17]

Van Hoomissen and Fadeley, JJ., join in this opinion.

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[17]The Court of Appeals concluded that "[p]laintiff's petition was constitutionally protected." *Shockey v. City of Portland*, 100 Or App 166, 170, 785 P2d 776 (1990). To the extent that that conclusion forecloses defendants from demonstrating to the trial court that plaintiff's petition is not protected by the First Amendment as a result of the application of the *Pickering* balancing test, I disagree.

IN THE SUPREME COURT OF THE
STATE OF OREGON

WILLIAM H. SHOCKEY
Appellant/Respondent
v.
PORTLAND CITY OF
Respondent/Petitioner
JACK C. IRVING
Respondent/Petitioner
JOHN LANG
Respondent/Petitioner
OREGON TRIAL LAWYERS ASSN
Amicus Curiae
AMERICAN CIVIL LIBERTIES UNION
Amicus Curiae
OREGON EDUCATION ASSN
Amicus Curiae
AFSCME COUNCIL 75
Amicus Curiae
AFSCME LOCAL 189
Amicus Curiae
PORTLAND POLICE COM OFFICER
Amicus Curiae
PORTLAND POLICE ASSN
Amicus Curiae
OREGON PUBLIC EMPLOYEES UNION
Amicus Curiae

ORDER DENYING RECONSIDERATION
SC S36999
CA A49282

The court has considered the Petition for Reconsideration and orders that it be denied.

DATED: August 25, 1992

/s/ Wallace P. Carson, Jr.

WALLACE P. CARSON, JR.
CHIEF JUSTICE

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FILED: July 9, 1992

IN THE SUPREME COURT
OF THE STATE OF OREGON

WILLIAM H. SHOCKEY,

Respondent on Review,

v.

CITY OF PORTLAND, a municipal corporation; JACK C. IRVIN, individually and in his official capacity; and JOHN LANG, individually and in his official capacity.

Petitioners on Review.

(CC A8611-06957; CA A49282; SC S36999)

In Banc

On review from the Court of Appeals.*

Harry Auerbach, Deputy City Attorney, City of Portland, attorney for petitioners on review.

Richard C. Busse, Portland, attorney respondent on review.

GILLETTE, J.

The decision of the Court of Appeals is reversed in part and affirmed in part. The judgment of the circuit court is reversed as to the wrongful discharge claim; otherwise affirmed.

Unis, J., concurred in part and dissented in part and filed an opinion in which Van Hoomissen and Fadeley, JJ., joined.

*Appeal from Judgment of Multnomah County Circuit Court, Robert L. Kirkman, Judge Pro Tempore. 100 Or App 166, 785 P2d 776 (1990).

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Petitioners on Review

[ ] No costs allowed. [X] Costs allowed, payable by: Respondent on Review

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APPELLATE JUDGMENT

MONEY JUDGMENT

Judgment #1

Creditor: CITY OF PORTLAND; JACK C. IRVIN, individually and in his official capacity; and JOHN LANG, individually and in his official capacity

Debtor: WILLIAM H. SHOCKEY

Costs: $145.00* $60.00 of this amount to be paid

Attorney Fees: -0- to: STATE COURT ADMINISTRATOR

TOTAL: $145.00

Interest: Simple, 9% per annum, from the date of this appellate judgment

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Appellate Judgment
Effective Date: September 17, 1992
SUPREME COURT
(seal)

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

SHOCKEY,
Appellant,
v.
CITY OF PORTLAND et al,
RESPONDENTS.
(8611-06957; CA A49282)

Appeal from Circuit Court, Multnomah County.

Robert L. Kirkman, Judge pro tempore.

Argued and submitted October 25, 1989.

Richard C. Busse, Portland, argued the cause and filed the briefs for appellant. With him on the reply brief was Donald B. Potter, Portland.

Harry Auerbach, Deputy City Attorney, Portland, argued the cause and submitted the brief for respondents.

Before Joseph, Chief Judge, and Warren and Rossman, Judges.

ROSSMAN, J.

Affirmed on claim for attorney fees incurred before Civil Service Board; otherwise reversed and remanded for proceedings not inconsistent with this opinion.

ROSSMAN, J.

Plaintiff contends that the City of Portland (city) and two of its employees, defendants Land and Irvin, fired him in retaliation for his circulating a petition protesting a work policy. He alleged claims for common law wrongful discharge and under 42 USC § 1983,[1] asserting that defendants violated his right to free speech under the First and Fourteenth Amendments. He also brought a claim against Lang and Irvin as individuals, alleging that they had intentionally interfered with his economic relations with city. He sought punitive

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[1]42 USC § 1983 provides:

"Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or cause to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit or equity, or other proper proceeding for redress."

damages on his § 1983 claim and, under 42 USC § 1988,[2] reasonable attorney fees. He also requested attorney fees incurred in reinstatement proceedings before the city's Civil Service Board.

In pretrial motions, the trial court struck plaintiff's requests for attorney fees and granted defendants' partial summary judgment on the § 1983 claim for punitive damages. After plaintiff rested his case, the trial court found that there was no evidence that he was fired for circulating the petition and, accordingly, granted defendants' directed verdict on the § 1983 and wrongful discharge claims. Although the trial court allowed plaintiff's intentional

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[2]42 USC § 1988 provides, in pertinent part:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, *** the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

interference claim to go to the jury, it struck any reference to his right to free speech. The jury returned a verdict for plaintiff, but awarded no damages. Plaintiff appeals; we affirm in part and reverse and remand in part.

Plaintiff was employed as a waste water mechanic for city and worked under Land and Irvin. During 1984, he learned that city, in an effort to comply with administrative rules that prohibit the wearing of respirators over facial hair, intended to adopt a clean shaven policy for all waste water mechanics. Plaintiff strongly opposed the policy. He has worn a beard for 25 years, because he develops an inflammatory skin rash when he shaves and because he has a "weak chin." He circulated a petition expressing dissatisfaction with the policy. the petition reads:

> "We, the undersigned, find the proposed rules demanding that beards be shaved before a

> respirator test can even be taken to be arbitrary and discriminatory. The wearing or not wearing of beards was not a condition of employment and any hazards that exist now existed at that time. Furthermore, if everyone on site is to be available in a chlorine emergency, the questions of fit, maintenance and hygiene of the respirators, the supplying of respirators for those who wear glasses, training of all employees in their use, hazard pay, and the availability of respirators for office staff, contractors' employees and visitors must be answered. The aforementioned proposed rules do not take into account the use of respirators by the last three mentioned groups. It would be far more practical to have a volunteer crew, specially trained and outfitted to deal with chlorine in emergency and non-emergency situations."

Despite the petition, the policy was implemented on August 1, 1984. Plaintiff subsequently refused to shave his beard, and, in an attempt to receive an exemption from the policy, he submitted medical evidence that he has a psychological attachment to his beard and that he develops a skin rash when he shaves. Nonetheless, he

was discharged on June 11, 1985. Shortly thereafter, he commenced this action, claiming that he was fired in retaliation for circulating the petition.

Plaintiff first argues that the trial court erred in allowing defendants' motion for a directed verdict on his wrongful discharge and § 1983 claims and in striking any reference to his right to free speech in his intentional interference claim. A directed verdict should be entered only when a reasonable person could draw only one inference from the evidence. *Van Den Bron v. Fred Meyer, Inc.*, 86 Or App 329, 738 P2d 1011 (1987). When reviewing a directed verdict, we interpret the evidence in the light most favorable to the non-moving party, who is entitled to every reasonable inference supported by the record. *Dennis v. McLean*, 53 Or App 282, 631 P2d 839, *rev den* 291 Or 771, 642 P2d 308 (1981). With those principles in mind, we hold that there

was evidence of a causal link between plaintiff's petition and his termination.

Plaintiff testified that Irvin and Lang appeared hostile toward his attempt to receive an exemption from the policy. Other employees testified that management had retaliated against other workers who spoke out against management practices or on safety issues. When asked about the petition, Lang admitted that it made him angry and caused him some anxiety. Irvin admitted that he did not assist plaintiff in finding other comparable city employment before terminating him, although he had done so for other employees who did not comply with the policy. Irvin also admitted that he ignored reports concerning plaintiff's psychological attachment to his beard. Even though 13 months had elapsed between the petition and his termination, we conclude that a jury could infer from the totality of the evidence that the petition was a

motivating factor in plaintiff's termination.

Defendants argue that, even if plaintiff was fired for circulating the petition, the trial court did not err because his speech was not protected by the First Amendment. Citing *Connick v. Meyers*, 461 US 138, 75 L Ed 2d 708, 103 S Ct 1684 (1983), they contend that plaintiff's petition is not protected because it does not relate to "matters of public concern." We disagree. Although plaintiff may have been motivated to circulate the petition for personal reasons, it questioned the practicality of the hazards inherent in the proposed policy. A major purpose of the First Amendment is to protect free discussion, including the manner in which the government operates. Mills v. Alabama, 384 US 214, 218, 16 L Ed 2d 484, 86 S Ct 1434 (1966). Plaintiff's petition was constitutionally protected.

Plaintiff also argues that the trial court erred in striking his request for attorney fees under § 1988 and in granting defendants' motion for summary judgment on his claim for punitive damages under § 1983. The trial court based those rulings on its determination that such damages are prohibited by the Oregon Tort Claims Act (OTCA). Under *Rogers v. Saylor*, 306 Or 267, 760 P2d 232 (1988), and our opinion in the same case, 88 Or App 480, 746 P2d 718 (1987), both rulings were in error.[3]

Plaintiff also argues that the trial court erred in striking his request in his intentional interference claim for attorney fees incurred in reinstatement proceedings before city's Civil Service Board. Attorney

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[3]In that § 1983 action, we allowed attorney fees, but held that the OTCA precludes a claim for punitive damages. 88 Or App at 484. On review, this court's decision to allow attorney fees was not contested, and the Supreme Court held that punitive damages are also recoverable. *2Rogers v. Saylor, supra*, 306 Or at 278.

fees and other expenses from another proceeding may be recovered in an action against a defendant when the defendant's charged wrongful conduct has involved the plaintiff in previous litigation with a third party. *C.I.T. Group/Equipment Financing, Inc. v. Young*, 99 Or App 270, 272, 782 P2d 169 (1989). The preceding litigation, however, did not involve a third party but rather the same defendants. Therefore, the rule of damages involving prior litigation with a *third party* is not applicable. The trial court properly struck the claim for attorney fees before the Civil Service Board.

Plaintiff finally argues that the trial court erred in denying his motion for a mistrial. The motion was based on the trial judge's acknowledgement that he "wouldn't have taken the case" had he known that he would be requested to evaluate the testimony of a certain city employee, a personal

acquaintance of the judge who had been involved in plaintiff's termination. We need not discuss that contention, because the problem should not arise on retrial.

Affirmed on the claim for attorney fees incurred before the Civil Service Board; otherwise reversed and remanded for proceedings not inconsistent with this opinion.

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

WILLIAM H. SHOCKEY,

Plaintiff,

v.

CITY OF PORTLAND, a municipal corporation; JACK C. IRVIN, individually and in his official capacity; and JOHN LANG, individually and in his official capacity,

Defendants.

No. A 86111-06957

JUDGMENT

This matter came on regularly for trial on May 25, 1988 before the undersigned judge, and a jury. Plaintiff William H. Shockey appeared through his attorney, Richard C. Busse. Defendants City of Portland, John Lang and Jack Irvin appeared through their attorney, Stuart J. Cutler.

Prior to the commencement of the trial, plaintiff moved to voluntarily dismiss his First Claim for Relief (Handicap Discrimination). The Court so ordered.

After plaintiff rested his case, and after having heard arguments by both counsel, the Court granted defendants'

motions for directed verdict against plaintiffs' Second Claim for Relief (Wrongful Discharge) and his Third Claim for Relief (42 USC § 1983). Accordingly, the Court ordered 2 and 3 dismissed.

The jury, having heard arguments by both counsel and, having been instructed on all matters of law and, having retired to deliberate upon its verdict, did thereafter on May 31, 1988 return into court a verdict in favor of defendants, which, omitting the title of the court and cause, was in the following form:

> We the jury, being first duly empaneled and sworn, do as our verdict answer as follows:
>
> 1. Has the Plaintiff established by a preponderance of the evidence that any of the Defendants listed below interfered with his economic relations with the City of Portland in any manner alleged in Plaintiffs complaint?
>
> Answer:

Defendant, Jack C. Irvin: Yes (Yes or No)

Defendant, John Lang: Yes (Yes or No)

If your answer to this question includes a Yes answer as to any defendant, then answer the next question. If your answers to this question is No as to all Defendants then skip the next question.

2. What sum of money has Plaintiff established by a preponderance of the evidence will compensate him for any emotional distress that he sustained which should be awarded against the Defendants listed below as a result of their interference with his economic relations with the City of Portland?

Answer:

Defendant, Jack C Irvin: $ 0 .
Defendant, Jack Lang: $ 0 .
Dated the 31 day of May, 1988.

/s/Glenn Buchanan
Presiding Juror

The matter now coming on for judgment upon the foregoing verdict, it is hereby

ORDERED AND ADJUDGED that defendants have judgment against plaintiff William H. Shockey and that such action be, and the same is, hereby dismissed in its entirety and with prejudice, and that the defendant is granted judgment against plaintiff William H. Shockey for defendants' costs and disbursements of $_____.

Dated this 29 day of June, 1988.

_____
Robert L. Kirkman
Circuit Court Judge, Pro Tem

Submitted by:

/s/ Stuart J. Cutler
Stuart J. Cutler, OSB #72062
Deputy City Attorney
Of Attorneys for Defendants